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No. 83-1418

In the

Supreme Court of the United States

October Term, 1983

City of Little Rock, et al.,
Petitioners,

v.

Johnnie Gilbert, et. al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER THE "BOTTOM LINE" APPROACH IS THE PROPER METHOD FOR DETERMINING THE ADVERSE IMPACT OF THE *NON-BARRIER* COMPONENTS OF A SELECTION PROCESS INCLUDING RANKING.

II. WHETHER A MULTI-COMPONENT SELECTION PROCESS HAS ADVERSE IMPACT IF THOSE MAKING HIGH SCORES ON ONE COMPONENT DO NOT ALSO MAKE HIGH SCORES ON OTHER COMPONENTS EVEN THOUGH THE AVERAGE SCORES ARE COMPARABLE AND EVEN THOUGH THE DIFFERENT COMPONENTS MEASURE DIFFERENT TRAITS.

III. WHETHER AN APPELLATE COURT MAY MAKE FINDINGS OF FACT CONTRARY TO OR INCONSISTENT WITH THE FINDINGS OF THE TRIAL COURT WITHOUT A DETERMINATION THAT THE LOWER COURT'S FINDINGS ARE CLEARLY ERRONEOUS.

IV. WHETHER AN APPELLATE COURT CAN REMAND A CASE FOR DETERMINATION OF THE ADVERSE IMPACT OF A SELECTION PROCESS WHEN THE PROCESS WAS FOUND TO BE VALID UNDER THE UNIFORM GUIDELINES.

PARTIES INVOLVED

The parties involved in this petition are: the City of Little Rock, Arkansas; the Civil Service Commission of the City of Little Rock, Arkansas; Walter E. "Sonny" Simpson; Carlton E. McMullin; Mahlon Martin; Susan Fleming, as Petitioners, and Johnnie Gilbert, Horace Walters, Andrew Lockhart, Billy O'Donald, Julius Bryant, Jack Matlock, Maxie Alexander, Jessie Briscoe, Grady Anthony, Marcella Wilson, Larry Bazzelle as Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners, City of Little Rock et al, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding November 29, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 722 F.2d 1390. It is set forth in Appendix A.

The Judgment of the Court of Appeals appears as Appendix C.

The Opinion of the District Court entered on August 13, 1982 is reported at 544 F.Supp. 1231. It appears as Appendix B.

The Order of the District Court entered on August 13, 1982 appears as Appendix D.

Excerpts from the testimony of Dr. Robert B. Ochsman appear as Appendix E.

Excerpts from the testimony of Walter E. Simpson appear as Appendix F.

JURISDICTION

The judgment of a Panel of the Court of Appeals for the Eighth Circuit was decided and entered on November 29, 1983. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES, RULES AND ORDINANCES INVOLVED

42 U.S.C. §2000e-2(h):

> Notwithstanding any other provision of this [title], it shall not be an unlawful employment practice for an employer* * *to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

Fed. R. Civ. P. 52(a):

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless

clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

This action was brought by twelve black police officers (one later non-suited) employed (or formerly employed) by the City of Little Rock, Arkansas. The Plaintiffs and Intervenors (hereinafter referred to as Plaintiffs) filed their EEOC charges on September 27, 1978, and their complaints on September 28, 1978, and February 22, 1979. Their claims were based upon racial discrimination in employment and were predicated upon 42 U.S.C. §2000e-5(f), 42 U.S.C. §1981, 42 U.S.C. §1983, 42 U.S.C. §1985, the Fourteenth Amendment, 31 U.S.C. §§1221, 1242, 1244 of the State and Local Fiscal Assistance Act of 1972, and 42 U.S.C. §3766 of the Omnibus Crime Control and Safe Streets Act of 1968.

The case was not a class action and the relevant time frame for the adverse impact issue in this action began on March 27, 1978, 180 days before the plaintiffs filed their EEOC charges. (Memorandum Opinion of the District Court at 7 (hereinafter "D.Ct. _____"), Appendix at B7 (hereinafter "A. _____").

In addition to finding no adverse impact, the District Court found there was no intentional discrimination resulting from the promotion process. D.Ct. 58, A. B62. The Court of Appeals affirmed stating that the challenge to the promotion procedures of the Little Rock Police Department (LRPD) was based only on the disparate impact theory. Opinion of the Court of Appeals for the Eighth Circuit 2,7 (hereinafter "C.Ct. _____"), A. A2,7. Since this theory is actionable only under Title VII and since the relevant time frame, for Title VII began in March, 1978, the only examinations involved on appeal were the 1978 and 1979 sergeant's exam and the lieutenant's exam for 1979. (The exam for 1978 was certified on February 17, 1978 and was outside the relevant time frame, JX35 No. 28.)

The promotional process for the LRPD is governed by state statute and the Little Rock Civil Service Commission

(CSC) which promulgates rules and regulations pursuant to those statutes. The CSC is made up of five members and since 1969 has always had one black member. D.Ct. 3-5, A. B3-5.

The components of the promotion process during the relevant time frame included a written test, a structured oral test, performance appraisal (service rating) and seniority. D.Ct. 33, A. B36. Candidates are ranked and must be selected for promotion in order of their composite scores. D.Ct. 32; A. B35. The written test is the only part of the promotional process that serves as a "pass-fail" barrier and it has no adverse impact against blacks. D.Ct. 28, A. B31; C.Ct. 10, A. A10.

For example, in 1978 the average score of whites on the sergeant's exam was 87.61 compared to 87.83 for blacks and in 1979 blacks averaged 86.66 compared to 82.29 for whites. Only one black, Grady Anthony, took the lieutenant's examinations in 1978 and 1979, (D.Ct. 29, A. at B31; Joint Exhibits 20 and 21 (hereinafter "JX _____")) and in 1978 he scored 88.00 on the written test compared to an average of 85.86 for whites in 1978. D.Ct. 28, A. B31.

The trial court also found that the oral interview had no adverse impact. D.Ct. 29, A. B32. In the 1978 sergeant's exam, blacks received an average oral score of 54.05 compared to 54.29 for whites and in 1979 they scored 65.45 compared to 63.97 for whites. A comparison of composite scores and service ratings discloses that in 1978 blacks had an average service rating of 88.94 compared to 90.43 for whites and an average composite score of 74.61 compared to 75.37 for whites. In 1979 this was reversed with blacks having an average composite score of 77.10 compared to 74.79 for whites. D.Ct. 29; A. B32.

Resultingly, the trial court found that no component of the promotional process had adverse impact against blacks. D.Ct. 29, 33; A. B32,35.

Black officers on the average are promoted to sergeant more quickly than whites. Black sergeants served an average of 2,912 days before being promoted to sergeant compared to 3,852 for whites. D.Ct. at 25, A. B28.

From 1975 to 1981, 8.7% of all promotions in the LRPD went to blacks although they constitute only 6.5% of the work force. D.Ct. 25, A. B27-28. Similarly, in 1978 and 1979 blacks received 11% of the promotions while comprising only 6.5% of the workforce. D.Ct. 34, A. B37.

In 1978 the City adopted a structured and standardized oral interview process, (Transcript at 642, hereinafter "T. ____") and the panelists are trained in its use. D.Ct. 33; A. B36. The Olympic method of scoring was used wherein the high and low scores were not counted. T. 1405-06. The oral panelists do *not* know the candidates' written test scores. D.Ct. 34, A. B37; T. 691, 1405-06, 1559.

The oral interview tests for different characteristics than the written examination (D.Ct. 33-34; A. B36) and just because someone scores differently on the written and oral examination does not indicate they are invalid. D.Ct. 36, A. B38; Testimony of Dr. Robert B. Ochsman, T. 929-33, A. El-4. Furthermore, the objectivity of the oral interview is safeguarded and there is little likelihood that bias or subjectivity could affect it D.Ct. 35, A. B38.

Additionally, the promotional process for sergeant and lieutenant used in 1978 and 1979 are content valid within the meaning of the EEOC's Uniform Guidelines of Employee Selection Procedures, 29 C.F.R. §1607.5 (1979). D.Ct. 19, 35; A. B21,38.

Further, between 1975 and 1979, sixteen (16) blacks and 227 whites passed the written test for sergeant and, of these, three (3) blacks (18.8%) and 31 whites (13.7%) were promoted. (Plaintiffs' Exhibit 1, and Defendant's Exhibit 7 B-19, hereinafter "PX _____" and "DX _____"). Thus there was no "bottom line" adverse impact. D.Ct. 37; A. B39-40.

Finally, the promotion process did not have an adverse impact on blacks in the rankings made from the test results. Testimony of Dr. Robert B. Ochsman, T. 954; D.Ct. 32-33, A. E4.

On August 13, 1982 the District Court entered judgment for the defendants on all issues. In so doing, the trial judge found that the only "pass-fail" barrier present in the LRPD's promotional process was the written examination which had no adverse impact and, further, was valid under the EEOC's Uniform Guidelines for Employee Selection Procedures (hereinafter "Uniform Guidelines"). She reviewed the scores received by blacks and whites on each component of the process and found that blacks and whites received comparable scores in the oral interview and performance appraisal or service ratings. As a result she ruled that none of the components to the promotional process had an adverse impact against blacks. Additionally, she found that the proportion of promotions going to blacks exceeded the black representation in the work force. Finally, she rejected the plaintiffs contention that there was "bottom line" adverse impact against blacks finding that this was not true. Resultingly, she held that neither of the individual components of the promotion process or the overall process itself had an adverse impact against blacks.

Going further the trial court also scrutinized the construction and operation of the structured oral interview and the promotion process as a whole. The court found that the oral interview process was developed in accordance with accepted professional standards, its objectivity was safeguarded, and there was little likelihood bias or subjectivity could effect a candidate's rating. The District Court concluded that the promotional processes in question, including the oral interview, were valid under the Uniform Guidelines.

On November 29, 1983, the Court of Appeals for the Eighth Circuit entered its judgment affirming the trial

court on all issues except whether the LRPD's promotion procedures for sergeant and lieutenant had an adverse impact against blacks.

The circuit court specifically affirmed the trial court's finding that the written examination had no adverse impact and did not disturb the findings that the average composite, oral and service scores for blacks and whites were comparable. Nonetheless, the appellate court found that the District Court erred in its analysis because "it did not focus on the interrelationship of the component parts of the promotional procedure." C.Ct. 9, A. A9.

Specifically the Court of Appeals held that the trial court did not focus on the ranking aspect of the promotion system and further stated that it is not sufficient to compare the average scores of blacks and whites on the various subparts of the process in determining whether a selection process has adverse impact.

> "Rather, the correlation between scores on the written exam on the one hand and on the oral exam, performance appraisal, and chief's rating on the other needs to be examined. Thus, if there is a low correlation, *i.e.* those blacks scoring high on the written exam do not score as relatively high on the other components, these other components would operate in a racially disparate manner."

C.Ct. 12, A. A12.

The Court of Appeals then reversed the District Court's finding that the promotion process had no adverse impact and remanded the case for reconsideration in light of these holdings.

ISSUES

The decision of the circuit court raises significant and novel issues. In *Connecticut v. Teal*, 457 U.S. 440, 73

L.Ed.2d 130 (1982), the Court decided the proper standard for determining, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, whether the "pass-fail" barrier components of a selection system had an adverse impact even though there was no "bottom line" adverse impact.

This case presents the next step beyond *Teal*: How are the courts, and employers, to determine whether the *non*-barrier components of a selection system have an illegal adverse impact? It is for this reason that defendants seek a writ of certiorari.

I. HOW DOES ONE DETERMINE IF A NON-BARRIER COMPONENT OF A SELECTION PROCESS HAS PROHIBITED ADVERSE IMPACT?

A. COMPARING AVERAGE SCORES IS AN APPROPRIATE METHOD.

Defendants submit that the circuit court erred in holding that comparing the average scores of blacks and whites is not an acceptable method of determining the adverse impact of a subpart of a selection process which is not a barrier to continued competition. To the contrary defendants argue such a comparison is both logical and proper.

"Although the adverse impact theory may be used in individual cases, it is most frequently employed in class actions since the employment practice in question, by definition, must affect a large group of persons rather than just the plaintiff individually." B. Schlei & P. Grossman, *Employment Discrimination Law* at 1324 (2d Ed. 1983) and authorities cited therein. Since the adverse impact theory focuses on *group* performance, it is appropriate that in determining whether adverse impact exists, one should compare the scores each *group* receives on a measuring in-

strument whether it is a written examination, an oral interview or a service rating. Probably the most common method of determining the score of a group of individuals for purposes of comparison is to compare the mean, or average, score.

This is precisely what the District Court did and the results showed that the average scores for blacks and whites were comparable: For example, in 1978 and 1979 blacks received oral interview scores of 54.05 and 65.45 compared to 54.29 and 63.97, respectively, for whites; and in 1978 blacks received an average score of 89.94 compared to 90.43 for whites on the service rating (D.Ct. 29, A. B32) (no service rating was used in 1979 which resulted in the state court litigation prohibiting permanent appointments from that exam, D.Ct. 36, A. B40). For all practical purposes such scores are identical and clearly whatever differences there might be could not be characterized as "significant" which is the level of difference necessary for there to be a violation of Title VII. See *e.g., Connecticut v. Teal, supra*, 73 L.Ed.2d at 137.

The District Court also compared the scores of Grady Anthony, the only black taking the lieutenant's exam during the relevant time frame, to the average scores of white officers and found them comparable. D.Ct. 29, A. B32 However, the disparate impact model is not appropriate where there is only a single black participating in the process since, already discussed, this model focuses on group performance and a single individual does not constitute a group. In short, a sample size of one individual does not permit the statistical inference necessary under impact analysis. See, *e.g., Mayor v. Educational Equality League*, 415 U.S. 605, 621 (1974); *Eubanks v. Pickens-Bond Const. Co.*, 635 F.2d 1341, 1350 (8th Cir. 1980).

Furthermore, the use of "mean" scores as a method of determining adverse impact is consistent with the EEOC's Uniform Guidelines on Employee Selection Procedures, 29

C.F.R. Part 1607 (1983). The Guidelines state, in discussing documentation of impact and validity evidence, that "[m]easures of central tendency (e.g., means)" should be reported for all selection procedures. 29 C.F.R. §1607.15.B(8) and C(5) (1983). Furthermore, even the Eighth Circuit appears to have recognized the probity of average scores in determining adverse impact. See *e.g., Firefighters Institute for Racial Equality v. City of St. Louis*, 549 F.2d 506, 510 n. 4 (8th Cir.), *cert. denied, sub. nom. Banta v. United States*, 434 U.S. 819 (1977).

Most important, however, comparing average scores is simple, straightforward and makes common sense. While there may be other equally acceptable methods of testing for the adverse impact of non-barrier selection components, that is no reason to eschew the use of mean scores.

B. A COMPARISON OF THOSE PROMOTED TO THE POOL OF QUALIFIED INDIVIDUALS IN THE WORKFORCE IS ALSO PROBATIVE.

Another means of assessing the adverse impact of a promotion process is to compare the proportion of promotions going to members of a protected minority to their proportion of the qualified labor pool. See, *Paxton v. Union National Bank*, 688 F.2d 552, 564 (8th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1772 (1983). Where promotions are made from within as they are in the LRPD, the Court of Appeals noted that the proper approach would be to compare the number of blacks promoted to the number of blacks on the police force having the minimum number of years in service required for promotion. C.Ct. 10, A. A9-10.

The District Court did make a similar comparison finding that from 1975 through 1981, blacks had received 8.7% of all promotions in the LRPD although they comprised only 6.5% of the workforce. D.Ct. 25, A. B27 & B28. Also, the court found there was no significant difference be-

tween the promotion rates for blacks and whites in any single year during that period. *Id.* Unfortunately, although specifically setting forth this standard of review in its opinion, the Court of Appeals overlooked the District Court's findings on this precise issue.

Such a comparison is probative evidence of whether a promotion system has adverse impact, and it is one specifically applied by the trial court in this case. Furthermore, as is discussed *infra*, the use of the selection rate to measure adverse impact inherently addresses the concerns the circuit court raised about the impact of ranking.

C. BUT THE "BOTTOM-LINE" APPROACH IS BETTER AND COVERS THE IMPACT OF RANKING AS WELL.

An even better method of determining the adverse impact of the non-barrier components of a selection process is to compare the number of those who passed all *barriers* to those actually selected, *i.e.*, the "bottom-line."

To determine any racially biasing effect of these non-barrier subparts, it is necessary to isolate the operation of such subparts from all outside influence. Since the written examinations used by the LRPD comprise a "pass-fail" barrier one must pass before the non-barrier components come to bear, it is necessary to begin one's analysis with those who passed the written exam, for unless a candidate passes this initial step he never participates in an oral interview or any of the other non-barrier components of LRPD's promotion process. D.Ct. 33, A. B36.

Such an approach is consistent with the Uniform Guidelines which speaks almost exclusively in terms of passing rates or selection rates when discussing proof of adverse impact. In fact, using the "bottom line", *i.e.*, selection rate, is dictated by the very definition of adverse impact:

> A substantially different *rate of selection* in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex or ethnic group.

29 C.F.R. §1607.16 B (1983) (emphasis supplied).

Additionally, the "bottom-line" approach of necessity addresses the concerns about the interrelationship of the component parts of a selection process articulated by the Court of Appeals in the present action. By comparing the beginning to the end, as it were, one need not fear that some hidden harbinger of adverse impact will go unnoticed.

Further, the "bottom-line" approach is relatively simple and straightforward. As such it would encourage employers to analyze their own employment practices and work to avoid or eliminate problems without costly judicial intervention.

Finally, such an approach is consistent with the Court's holding in *Connecticut v. Teal, supra*, which dealt only with *barriers* to employment. Mr. Justice Powell wrote for the dissent:

> Another possibility is that employers may integrate consideration of test results into one overall hiring decision based on that "factor" and additional factors. Such a process would not, *even under the Court's reasoning*, result in a finding of discrimination on the basis of disparate impact unless the actual hiring decisions had a disparate impact on the minority group.

Id. 457 U.S., at ____, 73 L.Ed.2d at 148 n. 8 (emphasis supplied). Certainly legal scholars have adopted this viewpoint. See *e.g.*, B. Schlei & P. Grossman, *Employment Discrimination Law* at 101 (2d Ed. 1983).

When such an analysis is made in the present case, the results are enlightening. Between 1975 and 1979 sixteen (16)

blacks passed the written exam for sergeant of whom three (3), or 18.8%, were ultimately promoted compared to 31 of 227 whites, or 13.7%. PX 1, DX 7B-19. Interestingly, the selection ratio for whites was only 72.9% of the selection ratio of blacks which is a violation of the 4/5th's Rule promulgated as the test for significant adverse impact in the Uniform Guidelines. 29 C.F.R. §1607.4 D (1983). Rather than indicating adverse impact against blacks, such analysis discloses the reverse—adverse impact against whites.

While the District Court found there was no "bottom line" adverse impact against blacks, the Court of Appeals ignored this finding and, instead, skirted the issue by excluding the acting sergeants appointed as a result of the 1979 promotion process from consideration thus allowing it to find that of the 26 officers promoted to sergeant beween 1975 and 1979 only one had been black. C.Ct. 9, A. A9.

Such an approach is fraught with error. First, it raises the question that the appellate court may have violated the "clearly erroneous" standard found in Rule 52(a) of the Federal Rules of Civil Procedure by ignoring the specific finding of the trial court that the acting sergeants should be included in any attempt to analyze the adverse impact of the selection process for sergeant and the reasons supporting that finding. D.Ct. 36-37, A. B39. But more importantly, it is unsound reasoning.

In 1979, the normal promotion process for sergeant was followed culminating in a list of eligibles being certified by the Civil Service Commission. Subsequent litigation in state court, however, resulted in the City being enjoined from making any permanent appointments from that list. Nonetheless, the Chief of Police filled all sergeant vacancies by appointing individuals as acting sergeants from the certified list exactly as if it had never been enjoined. As a result six (6) whites and two (2) blacks were promoted to acting sergeant. D.Ct. 36-37, A. B39.

The LRPD's 1979 sergeant's certified list resulted from the normal implementation of the promotion process and as such is as probative of the adverse impact of that process as its use in any other year. To ignore it excludes relevant and probative data thus biasing analysis and destroying its random character by selecting the particular data to be considered rather than "taking them as they come."

What is at issue is whether the *procedures* used by the LRPD to decide who will be promoted to sergeant have significant adverse impact against blacks, and the focus of such an inquiry, of necessity, must be on the operation and effects of those procedures. What occurs outside the operation of the promotion process is irrelevant to whether the process itself has adverse impact. The result would be no different if the injunction had required the LRPD to promote *more* blacks to sergeant irrespective of the results of the promotion process. Such an event would be equally irrelevant to a determination of the impact of the process itself.

Equally important, the exclusion of 1979 reduces an already small sample of sixteen to only nine. While the sample of whites (227) is obviously large enough to permit a finding of their normal promotion rate, a sample of sixteen blacks borders on being too small for reliable inference and a sample of nine is clearly too small to allow reliable conclusions. See *e.g., Coble v. Hot Springs School Dist. No. 6*, 682 F.2d 721, 733-34 (8th Cir. 1982); *Eubanks v. Pickens-Bond Const. Co.*, 635 F.2d 1341, 1350 (8th Cir. 1980).

The ultimate irony, however, is that even if one eliminates the 1979 sergeant's exam from consideration, there is still no significant adverse impact against blacks. The promotion rate for blacks does drop to 11.1% (1 of 9) compared to 13.4% (25 of 186) for whites but the promotion rate for blacks is still 83% of that for whites which is not a violation of the 4/5th's Rule in the Uniform Guidelines, and, thus, not a violation of Title VII. 29 C.F.R. §1607.4 D (1983);

see, also, *United States v. City of Chicago*, 663 F.2d 1354, 1357 n. 8 (7th Cir. 1981) (*en banc*); *Guardians Ass'n of the New York City Police Dept. v. Civil Serv. Comm'n.*, 630 F.2d 79, 85 (2d Cir.) *cert. denied*, 452 U.S. 940 (1980). And even the Eighth Circuit would agree. *Firefighters Institute for Racial Equality v. City of St. Louis*, 616 F.2d 350, 356-57 (8th Cir. 1980), *cert. denied, sub. nom., St. Louis v. United States*, 452 U.S. 938 (1981).

II. THE CORRELATION BETWEEN SCORES ON ONE COMPONENT OF A SELECTION PROCESS AND THE SCORES ON OTHER COMPONENTS IS NOT A PROPER METHOD FOR DETERMINING WHETHER THE COMPONENTS HAVE ADVERSE IMPACT.

As has already been discussed above the District Court held that the non-barrier subparts of the LRPD's promotion process did not have adverse impact and based this finding on the fact that the average scores of blacks and whites on these components were virtually identical. The Court of Appeals rejected this finding stating that it is not enough to compare the average scores of blacks and whites on these subparts but held that there must be high correlation between the scores on the written exam and the scores on the other subparts. "[I]f there is a low correlation, *i.e.* those blacks scoring high on the written exam do not score as relatively high on the other components, these other components would operate in a racially disparate manner." C.Ct. 12, A. A12. It is notable that the circuit court cites no precedent in support of this novel legal theory.

Defendants submit that no such rule of law exists and that the Court of Appeals committed clear error in so ruling. To reach such a conclusion the appellate court had to ignore the detailed findings made on this issue by the District Court as well as the evidence in the record.

At trial the plaintiffs contended that a lack of correlation between those making high scores on the

written exam and those making high scores in the oral interview was evidence of adverse impact. The trial court, after carefully considering the structure and use of the oral interviews, specifically rejected this contention. D.Ct. 36, A. B38.

As a question of fact the District Court found that, in addition to blacks and whites having almost identical average scores, the "oral examination is a necessary part of the total promotional process because there are many facets of a supervisor's position that cannot be adequately measured by a written examination, *e.g.*, communication skills, performance under stress, and ability to reason. It is also important to select an applicant who can work harmoniously with co-workers and present a forceful public image. These traits cannot be discovered from a written examination only." D.Ct. 33-34, A. B36.

It is important to note that these findings of fact were undisturbed on appeal. There was no appellate finding pursuant to Rule 52(a) of the Federal Rules of Civil Procedure that these conclusions were clearly erroneous, which is not surprising since they were supported by the weight of the evidence. See, *e.g.*, Testimony of Walter E. Simpson, Chief of Police, T. 1408-09, set out herein at A. F1; Testimony of Dr. Robert B. Ochsman, T. 929-33, set out herein at A. E1-4.

The District Court then scrutinized the construction and operation of the oral interview process and concluded:

> It is clear that the LRPD examinations for sergeant and lieutenant (both oral and written) are carefully developed in accordance with accepted professional standards and that they are closely related to the jobs for which they are used. The sources used for the examination questions are highly relevant to the sergeant's and lieutenant's positions in the LRPD. Also, the structured oral interview is a necessary part of the promotional process and not a barrier to favor one

> group over another. Its objectivity is safeguarded and there is little likelihood of bias or subjectivity playing a part in the rating of the candidates.

D.Ct. 34, A. B38.

Again it should be noted that the Court of Appeals did not rule that these findings were clearly erroneous and thus they remain undisturbed after appeal.

Finally, the trial court considered the precise issue in question, *i.e.*, whether there should be a high correlation between scores on the written exam and oral interview, and found that no such correlation was required:

> Just because someone might score high on the written test but does poorly on the oral examination does not mean that the oral is invalid. One reason different assessment techniques are used is to measure different qualities or attributes of an individual.

D.Ct. 36, A. B38.

This finding was supported by the record. Dr. Robert Ochsman, the defendant's expert whom the District Court found to be "eminently qualified to testify as an expert in test validation" (D.Ct. 24 n. 7, A. B38), addressed this issue in his testimony and pointed out that not only would one not expect to find high correlations between the scores on subparts measuring different traits but that the presence of such correlations would indicate a poorly designed testing process:

> Dr. Outtz testified that as an indictment of the oral that the oral scores didn't correlate well with the written scores. That is to say, one might score high on the written, but yet get a poorer score on the oral. Well, in fact, rather than being an indictment of the oral, this is actually a situation that is very typical and it is one, really, that I teach in a classroom as something that we

> try to do. That is to say, if we have several techniques or procedures to assess job candidates, it would certainly be a waste of time to have all of these techinques give us about the same scores or same indications.
>
> The reason that we use several different techniques or approaches is so that we get different aspects or independent attributes of people. So, in the written, while we're getting job knowledge, facts, and so forth, in the written tests, in the oral we're looking at an entirely different set of one's behavioral attributes. And in psychology this is simply known as independence of behaviors. It is something that we try to develop as part of the selection routine. It helps us get a well-rounded picture of somebody's behavioral attributes. Just because you know something about an individual doesn't mean that you know about those other components of that individual, and that's what the oral is designed to do. So, the fact that one may be high in the written and low in the oral, or conversely, is by no means an indication that the oral, or written for that matter, is bad. It tells us that we're measuring different aspects of attributes of the job candidate.

(T. 949-50)

It hardly requires an expert to tell us this, however. Simple logic dictates the same result.

Everyone does not possess the same level of skill and ability in every field. If one followed the reasoning of the circuit court, a student receiving an "A" in math would be a victim of discrimination if he or she did not also receive an "A" in history, English and biology. Such a rule ignores reality and the normal differences in the abilities of individual human beings regardless of race, sex or ethnic heritage. Certainly it is not a rule of law required by or even consistent with Title VII.

In deciding that the non-barrier components of the LRPD have no adverse impact the trial court compared the

average scores of blacks and whites on each component as well as the relative selection rates of those passing the only "pass-fail" barrier—the written exam. As discussed *supra*, that is sufficient to determine whether those components had adverse impact. The Court of Appeals, without rejecting the trial court's factual findings in that regard, now promulgates a rule of law which would effectively prohibit the use of different measurement devices to measure different traits, for if one must receive a comparable score on each such device or the devices will be found to have adverse impact, then the use of multiple measurement devices becomes either redundant (the score on one predicting the score on all) or illegal. Such an approach defies reason. It is analogous to holding that competitors in the decathlon must receive equally high scores on each event. Yet even the most athletically uninitiated knows that running a fast time in the 100 meter dash does not indicate that a competitor will be able to jump great heights in the pole vault. Each event measures different abilities and the results are not fungible. Likewise, the fact that someone received the highest score on a bar exam does not predict that he will be the most effective advocate or the most distinguished jurist to come from those taking the exam. Similarly, as the District Court found, the different subparts of the LRPD promotion process measure different abilities and the results on the components of that process are likewise not fungible.

III. THE COURT OF APPEALS VIOLATED F.R.C.P. RULE 52 IN MAKING FINDINGS OF FACT CONTRARY TO OR INCONSISTENT WITH THOSE OF THE DISTRICT COURT WITHOUT RULING THAT THE LOWER COURT'S FINDINGS WERE CLEARLY ERRONEOUS.

It is axiomatic that an appellate court may not reverse the factual findings of a district court unless those findings are clearly erroneous. Fed. R. Civ. P. Rule 52(a); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). And the appellate

court may not "substitute its interpretation of the evidence for that of the trial court simply because the reviewing court 'might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent.' " *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 857-58 (1982).

It should be noted as a threshold matter, however, that the Court of Appeals did not rule that a single finding of fact made by the District Court in this case was clearly erroneous. Nonetheless, despite the clear mandate of the Court in *Swint* and *Inwood*, the Court of Appeals made numerous findings of fact, several crucial to its ruling that the case should be reversed, which are directly contrary to or inconsistent with the findings of the District Court and the evidence adduced at trial.

For example, the Court of Appeals stated that at the time of trial there was only one black sergeant in the LRPD and no blacks were in any of the higher ranks. C.Ct. 9, A. 9. This is contrary to the specific finding by the District Court that "[s]erving under [the Chief of Police] at the time of the trial were two assistant chiefs, *Clarence Hunter* (*black*) and Jessie Hale (white)." D.Ct. 5, A.B5 (emphasis supplied). Further, stating that there was only one black sergeant ignores the fact that two blacks, Horace Walters and Billy O'Donald, were acting sergeants at the time of trial. D.Ct. 36, A. B39; T. 88, 153.

The Court of Appeals also held that the trial court did not focus on the interrelationship between the components of the promotion procedure. C.Ct. 9, A. A9. This ignores the District Court's finding that there was no "bottom'line" adverse impact and its careful scrutiny of the oral interview process. D.Ct. 32-37, A. B35-38.

Further, the appellate court held that the District Court did not focus on the ranking aspect of the promotional

system. C.Ct. 12, A. A11-12. This, too, is misleading. First, the District Court looked at the "bottom line" adverse impact which, as previously discussed, is a measure of adverse impact resulting from a ranking system. Second, the District Court discussed the ranking aspect of the promotion procedure immediately before holding that this procedure was fair and had no adverse impact on blacks. D.Ct. 32-33, A. B35-36. Finally, Dr. Robert Ochsman specifically discussed the ranking issue during his testimony and gave his expert opinion that there was no adverse impact against blacks as a result of ranking. T. 954, A. E4.

Even if the District Court did not make a finding specifically relating to the issue of ranking, it is improper to reverse or remand for a specific finding on that matter when a complete understanding of the issue is afforded by the record and the trial court's other findings. See, *e.g.*, *Clark v. Marsh*, 665 F.2d 1168, 1172 (D.C. Cir. 1981); *Bell v. Bolger*, 708 F.2d 1312, 1318, n. 8 (8th Cir. 1983). Certainly the District Court's findings and the record herein permitted a clear understanding of the ranking issue.

The Court of Appeals also found that "the procedures did not preclude oral panelists' access to a candidate's score on the written examination." C.Ct. 12, A. A12. Yet the District Court found, "the oral panelists did not know the candidates' written scores," (D.Ct. 34, A. B37), and this holding is supported by the record. T. 692, 953, 1406.

The appellate court also found that standardized oral interview responses were not introduced until 1979 (C.Ct. 12, A. A12) when a structured interview using standardized questions was actually first introduced in 1978. JX 16, T. 932-33; D.Ct. 35, A. B38.

Additionally, the Circuit Court found that the LRPD did not stop using "chief's points" until after 1978, (C.Ct. 8 n. 4, A. A8) but actually this factor was not used in any

sergeant's exam after 1977. T. 1395, 1507-08. And the parties so stipulated. JX 35 Nos. 26 & 27, Joint Stipulations of Fact.

The Court of Appeals also found that the oral interview, performance appraisals and the relative weight of each component involved decisions made by white supervisors on the basis of largely subjective criteria. C.Ct. 12, A. A12. The latter is clearly contrary to the finding of the District Court that the "objectivity [of the structured oral interview] is safeguarded and there is little likelihood of bias or subjectivity playing a part in the rating of the candidates." D.Ct. 35, A. B38.

The circuit court's intimation that these are decisions made by white supervisors is also contrary to the record and the findings of the District Court.

From 1975 through 1978 there was at least one black on each oral interview panel for sergeant: Charles Crawford in 1975 and 1976; Erma Hendrix in 1977; and Clarence Hunter in 1978. JX 13-16. Charles Crawford also was an oral panelist for the lieutenant's exam in 1976. JX 18. There was no lieutenant's test in 1977 and no oral interview in 1980. JX 19 and 22. In 1978 and 1979 the oral panel consisted of members of the Civil Service Commission with the addition of the City's Director of Employee Relations and an assistant police chief from Oklahoma City. JX 20 and 21. No oral panel involved any member of the LRPD until the structured oral interview format was adopted in 1978, and even then Clarence Hunter was a member.

Furthermore, Temperlene Horn, who, as Chief of Employment since 1978 is responsible for supervising the development and implementation of testing and selection procedures, is black. T. 587-88. Likewise, the City Manager at the time of trial was Mahlon Martin, who is black, and he had been in that position since July, 1980. D.Ct. 3, A. B2. Before that he had served as Assistant City Manager until

November, 1979. T. 511. Also two members of the seven member Board of Directors, Little Rock's governing body, one of whom was the Mayor, were black. D.Ct. 3, A. B3. Additionally since 1969 there has always been at least one black member of the Civil Service Commission. D.Ct. 3-4, A. B3-4. All these individuals have input into and control over the selection processes for the LRPD and, as a result, the decisions concerning those processes have hardly been the exclusive domain of white supervisors.

Finally, the Court of Appeals directed the District Court to scrutinize carefully the operation of the oral interview and these other procedures but ignored the fact that District Court had already done just that finding these processes to be safeguarded from abuse and having no adverse impact against blacks. D.Ct. 32-35, A. B35-38.

The Court of Appeals could not, consistent with *Swint* and *Inwood*, hold that the findings of the District Court were clearly erroneous—they simply have too much support in the record. Just as it would have been a violation of Rule 52 for the appellate court to nonetheless hold such findings clearly erroneous, it must equally be a violation for it to simply ignore the lower court's findings and make its own contrary and contradictory ones in order to support a conclusion that it could not otherwise reach.

IV. THE COURT OF APPEALS COULD NOT PROPERLY REMAND THE CASE FOR CONSIDERATION OF ADVERSE IMPACT WHEN THE DISTRICT COURT HAD ALREADY FOUND THE SELECTION PROCESS AND ALL ITS COMPONENTS TO BE VALID UNDER THE UNIFORM GUIDELINES.

In addition to finding that neither the promotion process as a whole nor any of its subparts had adverse impact, the District Court also found that the process and

components were valid under the Uniform Guidelines. D.Ct. 19, 35, 37; A. B21, 38, 40. Since the Court of Appeals did not find this conclusion to be erroneous it stands as affirmed and as a result the adverse impact of the selection process is irrelevant.

The validity of a selection process comes into question only after the process has been shown to have adverse impact. If significant impact is shown then and only then the inquiry becomes whether the selection device is "job-related" i.e., valid. *Connecticut v. Teal*, 457 U.S. 440, 73 L.Ed.2d 130, 137 (1982).

Since the District Court has already found the selection device to be valid under the Uniform Guidelines and to satisfy the dictates of *Teal*, it is a useless act to remand the case for consideration of issues of adverse impact. Under such circumstances even if one assumes *arguendo* that the District Court erred in finding no adverse impact, it is harmless error since its determination that the process is valid mandates judgment for the defendants.

CONCLUSION

The case raises significant and novel questions of law concerning the interpretation of Title VII of the Civil Rights Act of 1964, as amended. The law is now clear concerning how an employer must assess the adverse impact of a selection device that serves as a "pass-fail" barrier. However, this case raises the important question of how is the adverse impact of *non*-barrier selection devices to be determined?

Of equal importance, the Court of Appeals has created a legal standard contrary to the accepted professional standard in the field of industrial psychology governing the development of selection devices. If allowed to stand, such a standard will frustrate the development of more narrowly focused examination processes aimed at making more accurate assessments of specified traits and will force a return to the use of single instruments that are supposed to test for all traits. This directly contravenes the evolution of testing devices which has been toward the more specific and away from the general aptitude tests that have been repeatedly found wanting by this and other courts.

For these and the other reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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